Yayasan Bumiputera Sabah & Anor v Apoview Wood Products Sdn Bhd (receivers and managers appointed)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1727 OF 2009
RAMLY ALI, AZHAR MA'AHAND ABD AZIZ ABDUL RAHIM JJCA
14 MAY 2012

Companies and Corporation — Receivership — Winding up — Effect of — Winding up order entered against respondent — Locus standi of receiver and manager — Right to continue representing respondent — Whether respondent ceased to be agent and lost right to maintain action — Distinction between 'in rem powers' and 'personal powers' of receiver and manager after liquidator appointed — Receiver and manager's possessory powers over charged assets — Whether includes powers to run respondent's business as going concern

The appellants were appealing against the decision of the learned High Court judge in upholding the decision given by the learned deputy registrar who held that the receiver and manager appointed under a debenture had the right to represent the respondent in the action despite the entry of a winding up order made against the respondent. In this case, the respondent had applied to a bank for loan facilities and for that purpose, a debenture dated 17 June 1998 was duly executed by the parties. When the respondent defaulted, the bank appointed a receiver and manager on 12 April 2004. This suit was commenced in the name of the respondent by the receiver and manager as agent of the respondent in respect of an action for conversion of machines which took place in November 2003. The High Court allowed the respondent's summary judgment application. In the mean time, on application of other creditors, a winding up order was entered against the respondent. After the respondent was wound up, the appellant raised objection as to the locus standi or right of the receiver and manager to represent the respondent in the action. The learned deputy registrar found in favour of the receiver and manager and dismissed the appellants' objection. The appellants' appeal to the High Court against the said decision was dismissed. The only pending matter at the material time of the appellants' objection was the assessment of damages arising from the act of conversion of the said machines by the appellants to a third party. The issue before this court was whether, in the light of the winding up order entered against the respondent company, the receiver and manager had locus standi or right to continue representing the respondent company in this present action, at the stage of assessment of damages after judgment had been earlier obtained by the respondent (through the receiver and manager acting as its agents).

Held, dismissing the appeal with costs:

(1) The receiver and manager and the court appointed liquidator in the

winding-up can exist side by side and each exercising separate duties and powers by virtue of the Companies Act 1965 (particularly s 236) and the debenture in question (see para 9).

(2) At the material time when the locus standi of the receiver and manager was challenged by the appellants, the respondent had already obtained a judgment in its favour against the appellants in relation to the charged assets and they were only at the stage of assessment of damages before the learned deputy registrar (see para 30).

(3) In the present case, the receiver and manager had the necessary locus standi and rights to represent the respondent in the High Court and in the present action in relation to the entry of the winding up order against the respondent. This was because the receiver and manager retained their possessory powers over the charged assets (the two units of machineries). However, it must be added that such powers do not include powers to run the respondent's business as a going concern ie incurring debts. Such powers to run the business of the respondent as a going concern and ultimately to incur debts should be left to the court appointed liquidators in the winding up (see para 33).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam mengesahkan keputusan yang diberikan oleh timbalan pendaftar yang bijaksana yang memutuskan bahawa penerima dan pengurus yang dilantik di bawah debentur mempunyai hak untuk mewakili responden di dalam tindakan tersebut walaupun pemasukan perintah penggulungan dibuat terhadap responden. Di dalam kes ini, responden telah memohon kepada sebuah bank untuk kemudahan pinjaman dan bagi tujuan itu, satu debentur bertarikh 17 Jun 1998 telah ditandatangani oleh pihak-pihak. Apabila responden gagal membayar, bank melantik penerima dan pengurus pada 12 April 2004. Guaman ini dimulakan di atas nama responden sebagai penerima dan pengurus sebagai agen responden berkaitan dengan tindakan penukaran mesin yang dibuat pada November 2003. Mahkamah Tinggi membenarkan permohonan penghakiman terus responden. Sementara itu, atas permohonan pemiutang lain, satu perintah penggulungan telah dimasukkan terhadap responden. Selepas responden digulungkan, perayu membangkitkan bantahan berkaitan dengan locus standi atau hak penerima dan pengurus mewakili responden dalam tindakan tersebut. Timbalan pendaftar yang bijaksana membuat penemuan memihak kepada penerima dan pengurus dan menolak bantahan perayu-perayu. Rayuan perayu-perayu kepada Mahkamah Tinggi terhadap keputusan tersebut telah ditolak. Satu-satunya perkara yang masih tinggal pada masa material semasa bantahan perayu-perayu adalah penilaian ganti rugi berbangkit daripada tindakan penukaran mesin-mesin tersebut oleh perayu-perayu kepada pihak ketiga. Isu di hadapan mahkamah ini adalah sama ada, berikutan perintah penggulungan

yang dimasukkan terhadap syarikat responden, penerima dan pengurus mempunyai locus standi atau hak untuk terus mewakili syarikat responden di dalam tindakan ini, pada peringkat pentaksiran ganti rugi selepas penghakiman telah diperoleh terlebih dahulu oleh responden (melalui penerima dan pengurus bertindak sebagai ejennnya).

Diputuskan, menolak rayuan dengan kos:

(1) Penerima dan pengurus dan pelikuidasi yang dilantik mahkamah dalam penggulungan boleh wujud bersama dan setiap satu melaksanakan tanggungjawab dan kuasa yang berbeza berikutan Akta Syarikat 1965 (khususnya s 236) dan debentur yang dipersoalkan (lihat perenggan 9).

(2) Pada masa material apabila locus standi penerima dan pengurus dicabar oleh perayu-perayu, responden telah pun memperoleh penghakiman memihak kepadanya terhadap perayu-perayu berkaitan dengan aset-aset yang digadaikan dan mereka hanya berada pada peringkat pentaksiran ganti rugi di hadapan timbalan pendaftar yang bijaksana (lihat perenggan 30).

(3) Di dalam kes ini, penerima dan pengurus mempunyai locus standi yang sewajarnya dan hak untuk mewakili responden di Mahkamah Tinggi dan di dalam tindakan ini berkaitan dengan pemasukan perintah penggulungan terhadap responden. Ini adalah kerana penerima dan pengurus mengekalkan kuasa pemilikan mereka ke atas aset-aset yang digadaikan (dua unit mesin). Walau bagaimanapun, ia mesti ditambah bahawa kuasa tersebut tidak termasuk kuasa untuk menjalankan perniagaan responden sehingga mengalami kerugian. Kuasa untuk menjalankan perniagaan responden secara berterusan dan membawa kepada kerugian wajar diletakkan pada pelikuidasi yang dilantik oleh mahkamah dalam penggulungan (lihat perenggan 33).]

Notes

For a case on effect of winding up, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 782.

Cases referred to

Director of Customs Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600; [1995] 3 CLJ 316, SC (refd)

Gosling v Gaskell and Grocott [1897] AC 575, HL (refd)

Gough's Garages v Pugsley [1930] 1 KB 615, KBD (refd)

Henry Pound, Son & Hutchins (1889) 42 Ch D 402, CA (refd)

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)

Landmark Corp, Re (1968) 88 WN (NSW) Pt 1 194 (refd)

Manchester and Milford, Re Ry LJ Ch 369 (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)
Sowman v David Samuel's Trust [1978] 1 All ER 616 (refd)
Strong v Carlisle Press [1893] 1 Ch 268, CA (refd)
United Malayan Banking Corporation Bhd v The Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor [1986] 1 MLJ 75 (refd)

Legislation referred to

Companies Act 1965 s 236
Federal Constitution art 13

Appeal from: Civil Suit No K22–23 of 2005 (High Court, Kota Kinabalu)

Chung Jiun Dau (Chung & Associates) for the appellants.
Celestina Stuel Galid (Jayasuriya Kah & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the appellants (defendants) against the decision of the learned High Court judge dated 17 July 2009 in upholding the decision given by the learned deputy registrar dated 13 March 2009 who held that the receiver and manager appointed under a debenture had the right to represent the respondent (plaintiff) in the action despite the entry of a winding up order made against the respondent (plaintiff).

FACTUAL BACKGROUND

[2] The respondent (plaintiff) — Apoview Wood Products Sdn Bhd (in liquidation) had applied to the bank for loan facilities in the principal sum of RM4,500,000 in the forms of an overdraft facility, export credit refinancing (ECR) (pre-shipment) facility and export credit refinancing (ECR) (post-shipment) facility. For that purpose a debenture dated 17 June 1998 was duly executed by the parties.

[3] The respondent is a company, inter alia, carrying on business or trade as manufacturers, processors, assemblers, agents, importers and exporters, wholesale and retail of all kinds of wood products, convert and prepare for market timber, logs, wood and all other similar produce of every kind and description and to buy, sell, barter, exchange or otherwise deal in the same.

[4] When the respondent defaulted, the bank appointed a receiver and manager on 12 April 2004. This suit was commenced by filing the writ of summon and the statement of claim in the name of the respondent by the

receiver and manager as agent of the respondent on 5 February 2005 in respect of an action for conversion of machines which took place in November 2003. On 28 May 2005 the respondent applied for a summary judgment against the appellants and on 15 August 2005 the High Court heard and allowed the summary judgment.

[5] In the mean time, on 19 September 2008 a winding up order was entered against the respondent, on application of other creditors. On 13 September 2009, the appellant raised on objection as to the locus standi or right of the receiver and manager to represent the respondent in the action after the respondent was wound up. The learned deputy registrar found in favour of the receiver and manager and dismissed the appellants' objection. The appellants appealed to the High Court judge in chambers against the said decision of the learned deputy registrar. On 17 July 2009 the learned High Court judge dismissed the appellants appeal. The only pending matter at the material times of the appellants' objection was the assessment of damages arising from the act of conversion of the said machines by the appellants.

[6] In other words, the respondent (acting through the receivers and managers) had succeeded in the High Court and Court of Appeal resulting in a court order awarding damages in favour of the respondent to be assessed as the machineries had been wrongfully disposes of by the appellants to a third party.

THE APPELLANTS' CONTENTIONS

[7] Learned counsel for the appellants, Mr Chung Juin Dau contended that as from 19 September 2008 when the winding up order was entered against therespondent, the receiver and manager were no longer agents of the respondent; and therefore cannot represent the respondent once the winding up order was entered. The learned counsel further contended that the cause of action in the suit belongs to the respondent and is not something which the receiver and manager can exercise possessory right over the choses in action or things in action in respect of the said machines and therefore they do not have the powers to continue the action as agents of the respondent after the winding up. Learned counsel expressed his stand that once a liquidator is appointed pursuant to a winding up order a receiver and manager lose his status as agents of the respondent company.

THE RESPONDENT'S CONTENTIONS

[8] Learned counsel for the respondent, Ms Celestina Stuel Galid, submitted that the receiver and manager in the present case were appointed pursuant to a debenture dated 17 June 1998; and the said machines (two units of CNC

Router Machines) which were converted by the appellants were part of the movable assets charged under the Second Schedule of the debenture. The powers of the receiver and manager under the debenture, expressly include the power to 'bring take defend discontinue any actions suits and proceedings'. Learned counsel concluded that notwithstanding the winding up the receiver and manager were empowered under the debenture to continue the action, namely for assessment of damages based on a summary judgment which had been duly granted by the court on 15 August 2005; and had never been set aside.

[9] Learned counsel also submitted that the receiver and manager and the court appointed liquidator can exist side by side; and each exercising separate duties and powers conferred by the Companies Act 1965 and the debenture.

DECISION OF THE HIGH COURT

[10] The learned High Court judge found in favour of the respondent and dismissed the appeal by the appellants. His Lordship agreed with the views of the learned counsel for the respondent that the receiver and manager retain possessory powers over the charged assets despite the appointment of a liquidator in a winding up; and the powers of the receiver and manager are curtailed only in respect of running the respondent as a going concern ie incurring debts. The learned judge affirmed the decision of the learned deputy registrar who held that the receiver and manager appointed under the debenture in the present case had the right to represent the respondent in this action despite the entry of the winding up order against the respondent.

DECISION OF THIS COURT

[11] The issue before us is quite straight forward ie whether in the light of the winding up order entered against the respondent company, the receiver and manager have locus standi or right to continue representing the respondent company in this present action, at the stage of assessment of damages after judgment had been earlier obtained by the respondent (through the receiver and manager acting as its agents).

[12] In the present case, the receiver and manager were duly appointed pursuant to the debenture dated 17 June 1998. Under section 5.0(c) of the said debenture, the bank may appoint any persons to be receiver and manager of the properties and assets thereby charged and may in the like manner from time to time remove any receiver or manager so appointed and appoint another or others in his stead.

[13] The properties and assets charged under the debenture are listed under

First, Second and Third Schedules to section 2.01 of the debenture. In the First Schedule, the properties or assets charged by way of first fixed charge was over the respondent's land held under CL 02533976 situated in the district of papar erected thereon a wood and rattan processing and fabrication facility comprising:

(a) one three-storey office block;

(b) one semi-open sided postal frame warehouse;

(c) one linked-posted frame structure accommodating the wood processing factory/production area/treatment area; and

(d) a 22' wide 'pre-mixed' carriageway giving access to all areas/perimeter of the site together with covered and uncovered car parking bays, lorry parking bays and lay-bays.

[14] In the Second Schedule, the properties or assets charged by way of a first fixed charge were all the respondent's factory including all its plants, machinery, equipment, motor vehicles, furniture and fittings and other fixed assets both present and future whatsoever on CL 025339753 situated in the district of papar and wheresoever's situated excluding machineries, equipment and other assets under hire purchase.

[15] In the Third Schedule, the properties or assets charged by way of a first floating charge were the respondent's undertaking properties and assets (other than those referred to in Second Schedule above) movable or immovable wheresoever's situated both present and future including but not limited to its uncalled capital, goodwill, all stocks-in-trade, semi finished products and raw materials, book departments and accounts, bonds and notes both present and future.

[16] Under section 5.01(d) of the debenture the bank as well as the receiver and manager are empowered 'to seize any properties or assets hereby secured and to effect a proper and valid sale or disposition thereof on such terms and for such consideration as the Bank or such authorized person shall think for with liberty to buy or resell the same'.

[17] The powers of the receiver and manager are outlined precisely under section 5.03 of the debenture. They, inter alia, include:

(a) to take possession of and get in all or any of the assets of the borrower hereby charged;

(b) to carry or concur in carrying on the business of the borrower as agents of the borrower;

(c) raise and borrow money on the security of any or all of the borrower's assets and properties upon such terms as he or they shall think fit;

(d) to sell or concur in selling any of the assets hereby charged. In exercising the power of sale hereby conferred the receiver and or manager may sell at such time and in such manner at such price as he or they may in his or their absolute discretion think fit and in exercising such discretion he or they may have in regard to have views and desires of the bank. The receiver and or managers shall not be accountable for any loss or damage which may be suffered by the borrower by reason of the exercise of such discretion;

(e) to make any arrangement or compromise which he or they may think fit, bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged hereunder;

(f) to do all such other reasonable acts and things as may be considered to be incidental to or conducive to any of the matters or powers aforesaid and which he or they lawfully may or can do as agent of the borrower; and

(g) to perfect, complete and register any security documents.

[18] Section 5.03(e) of the debenture clearly provides for the powers for the receiver and manager to 'bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged' under the debenture.

[19] Section 5.04 of the debenture also provides:

> The Borrower (Respondent) hereby irrevocably appoints the Bank to be its attorney and in its name and on its behalf to do execute any deed assurance or act which may be required or may be deemed proper on any sale or disposition by the Bank or by any Receiver and or Manager as aforesaid of any properties or assets of the Borrower under any power of sale or other disposition applicable thereto and also to do and execute all such other deeds assurance or acts as the attorney shall deem expedient in the premises. The Bank shall have the power to receive and to give good receipts for the proceeds of the sale.

[20] 'Receiver' is a person appointed under the terms of a debenture or by the court to realise assets charged and apply the proceeds for the benefit of those entitled. In *Re Manchester and Milford* Ry LJ Ch 369, Jessel MR in distinguishing a 'receiver' and 'manager' in the technical sense observed:

> A receiver means a person who receives rents or other income of property but he does not manage the property in the sense of buying and selling or anything of that kind. The receiver merely takes the income and pays necessary outgoings; the manager carries on the trade or business.

[21] The proposition that the agency of the receiver and manager is terminated on the winding up of a company (as contended by the appellants in the present appeal ought to be carefully examined.

[22] Lord Halsbury in the case of *Gosling v Gaskell and Grocott* [1897] AC 575 at p 583 was of the view that on the winding up of the company, the authority of the receiver and manager to carry on the business of the company is terminated by operation of law; the winding up legislation only allows the business of the company to be carried on by the liquidator for the purpose of the winding up and any contracts entered into by the receiver and manager in the ordinary course of business will not bind the company. The winding up legislation (as found in the Companies Act 1965) deprives the receiver and manager of any power to carry on the business of the company as its agent so as to create debts as against its unencumbered assets. But to go further and hold that the receiver and manager general agency is terminated for all purposes by the winding up is unwarranted and supported by no provisions of law.

[23] The learned authors of the *Corporate Receivership - The Law and Practice in Malaysia and Singapore*, [1997] by Saheran Suhendran bin Abdullah, Lim Tian Huat and Edwin Chew at pp 110–111 states:

> It is submitted that the true effect of winding-up is as stated by Rigby LJ in the Court of Appeal. His Lordship's finding is limited only to the proposition that the winding-up legislation deprives the receiver of any power to carry on the business of the company as its agent so as to create debts as against its unencumbered assets. His Lordship went no further. Accordingly, it is submitted that the true effect of this statutory prohibition is only to limit the receiver's agency and powers by depriving the receiver of the power to create debts against the unencumbered assets of the company.
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> It is noted that the above represents the only statutory prohibition that imposes a limitation on the receiver's powers. In the absence of any other principle of law that would cause the termination of the receiver's agency for all purposes, the receiver's other irrevocable powers which would ordinarily survive the winding up and his general agency, to the extent to which it is unaffected by the statutory prohibition, should therefore survive.

[24] It is generally accepted that the receiver and manager powers over the charged assets and the power to institute actions in the company's name continue after winding up (see *Sowman v David Samuel's Trust* [1978] 1 All ER 616; *Gough's Garages v Pugsley* [1930] 1 KB 615; and *United Malayan Banking Corporation Bhd v The Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75).

[25] The bank in the present case is a secured creditor with the security as stated in the debenture, inter alia, being first fixed charges and floating charges.

Thus the bank as secured creditor of the respondent company can operate outside the liquidation upon winding up of the respondent company and its security as found in the debenture can be enforced independently of the liquidation process, (see *Henry Pound, Son & Hutchins* (1889) 42 Ch D 402; *Strong v Carlisle Press* [1893] 1 Ch 268; *Re Landmark Corp* [1968] 88 WN (NSW) Pt 1 194; *Director of Customs Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600; [1995] 3 CLJ 316 (SC)). Generally the rights of the security and the security itself are unaffected by the winding up and powers ought to be unaffected by the winding up so as to allow the bank (through the receiver and manager to realise the security outside the liquidation).

[26] We are in agreement with the submissions of the learned counsel for the respondent that the receiver and manager and the court appointed liquidator in the winding up can exist side by side and each exercising separate duties and powers by the Companies Act 1965 (particularly s 236) and the debenture in question. On this point, we are in agreement with the learned authors of the book 'Corporate Receivership — The Law and Practice in Malaysia and Singapore' at p 111:

> the liquidator's statutory agency which is created by the winding-up legislation is not so inconsistent with the receiver's agency so as to cause the termination of the receiver's agency for all purposes. The liquidator's statutory agency exists primarily in relation to the unencumbered assets for the benefit of the unsecured creditor which explains why the winding-up revokes the receiver's power to create debts as against the unencumbered assets. However, the liquidator is unable to exercise his statutory powers over charged assets to the exclusion of the secured creditor. Similarly, any receiver appointed for the secured creditor's benefit should remain unaffected by the liquidator's agency save, of course, for his power to create debts as against the unencumbered assets of the company which power is divested by statutory intervention.

[27] The Federal Court in the case of (*K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 CLJ 793 held:

> On appointment, a receiver and manager becomes an agent of the company and that agency ceases upon the winding up of the company. Nevertheless, he still retains his possessory right to the charged assets and his status is best described by Edgar Joseph Jr FCJ in the case of *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In Liquidation v Bank Bumiputera (M) Bhd & Ors* [1997] 3 CLJ 274 ('Kimlin') to be as follows:
>
> > To put it another way, winding up after a receiver and manager is appointed terminates his purely personel powers but not his in rem powers.

> The distinction between a receiver's and manager's in rem powers and his personel powers is this: the former flow from the security created by the debenture and relate to the assets of the company whereas the latter relate to everything else. So, for example, in *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616, a receiver appointed over assets which included a mortgage debt could validly exercise the power of sale in the name of the company despite its liquidation. This power, being coupled with an interest, was irrevocable both at common law and by statute and accordingly, a power given to the receiver for the purpose of securing a benefit to the debenture holders was irrevocable as a power given to the debenture holders themselves. It was further held that the sale did not contravene s 227 of the Companies Act 1948 (equivalent to the Malaysian s 223) since although made in the name of the company it was a sale of property which did not belong to the company but formed part of the debenture holder's security.

[28] At p 810 of the said case (*K Balasubramaniam*), Siti Norma Yaakob FCJ said:

> In practice the liquidator exists side by side with the receiver with each exercising his separate powers and duties conferred on them by the Act in the case of the former and by the debenture in the case of the latter. There is no question of any ranking or of one being superior to the other or of one taking precedence of the other and as explained by Needham J in *Expo International Pty Ltd & Anor v Chant & Ors* (1979) 3 ACLR 888, 'a receiver, while he has a prior right to possession of the assets subject to the charge given to the person who appointed him over the right of the liquidator, nevertheless has possession for a limited purpose, namely, to comply with his duties to account to the mortgagee'.

[29] It is almost settled that a winding up of a company after receiver and manager are appointed terminates his purely personal powers but not his in rem power. The difference between the two has been explained by Edger Joseph Jr FCJ in the case of *Kimlin Housing Development Sdn Bhd* ie they continue to retain possessory rights conferred by the debenture to take custody and control of all assets charged under the debenture.

[30] In the present case, it is not in dispute that the assets in question ie the two units of CNC Router Machines (the subject matter of the present action) were part of the movable assets charged under the Second Schedule of the debenture by way of a first fixed charge. It is also not in dispute that the receiver and manager as the agent of the respondent under section 5.03(a) of the debenture are empowered 'to take possession of and get in all or any of the assets of the Borrower (the Respondent) hereby charged'. It is also not in dispute that section 5.03(e) of the same debenture allows the receiver and manager 'to make arrangement or compromise which they may think fit, bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged hereunder'. It must also be noted that at the

material time when the locus standi of the receiver and manager was challenged by the appellants, the respondent had already obtained a judgment in its favour against the appellants in relation to the charged assets and they were only at the stage of assessment of damages before the learned deputy registrar.

[31] The respondent's right to the said machineries do not disappear when they were wrongfully disposed off to a third party. The respondent instead of getting the machineries back has successfully obtained a judgment ordering damages to be assessed by the learned deputy registrar. A judgment of this nature has been held by the Federal Court in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321, to be a 'property' within the provisions of art 13 of the Federal Constitution, Abdul Hamid Mohamad CJ (as he then was) said:

> Para 1 of the Schedule of the CJA itself provides that mandamus may be issued 'for the enforcement of rights conferred by Part II of the Constitution, or any of them …' Article 13 which is the last article in Part II of the Constitution provides:
>
> (1) No person shall be deprived of property save in accordance with law.
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> In other words, mandamus may issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law. Here, the respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying, clearly the State Government of Sabah has deprived the Respondent of its property contrary to law.

[32] On this point, we agree with the learned High Court judge that 'hence the judgment of the plaintif (respondent) in my view is notionally the machineries and the receiver and manager retain their possessory rights over the machineries, though in a form of a judgment and with it the right to pursue this claim'. It does not matter whether the said wrongful conversion of the machineries was committed by the appellants long before the appointment of the receiver and manager on 12 April 2004.

CONCLUSION

[33] Based on the above consideration, our answer to the issue before us is this: that the receiver and manager in the present case have the necessary locus standi and rights to represent the respondent in the High Court in the present action dispute the entry of the winding up order against the respondent. This is because the receiver and manager retain their possessory powers over the charged assets (the two units of machineries). However, it must be added that such powers do not include powers to run the respondent's business as a going concern ie incurring debts. Such powers to run the business of the respondent

as a going concern and ultimately to incur debts should be left to the court appointed liquidators in the winding up.

[34] On the above findings we unanimously dismiss the appeal with costs of RM10,000 to the respondent. We also make an order that the deposit be paid to the respondent on account of fixed costs.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed